85-389

Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN J. CHAPMAN, *et al.*,
Petitioners,

v.

ROBERT E. LUNA, PH.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRUCE E. PASTERNACK
BRUCE E. PASTERNACK, P.C.
Two Woodward Center
700 Lomas, N.E., Suite 100
Albuquerque, New Mexico 87102
(505) 842-1800
Attorney for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

398

QUESTION PRESENTED

Where a state interprets its equal protection clause as substantively identical to the correlative federal guarantee, may a state court avoid awarding attorney's fees in a civil rights case by labelling its decision that equal protection was denied as resting solely on state law?

LIST OF PARTIES BELOW

1. John J. Chapman
2. Troy H. Elliott
3. N. Altom
4. Robert E. Luna, Ph.D.
5. Ann Hyde
6. Erika Jones
7. Jonathan Samet, Ph.D.
8. Gary Lewis
9. James Montoya
10. Mike Creusere
11. City of Albuquerque
12. County of Bernalillo
12. Hamilton Test Systems, Inc., intervenor in the district court, is not a party to this appeal. On May 21, 1984, pursuant to a stipulation among all parties, the Motion for Attorney's Fees was withdrawn with respect to Hamilton Test Systems

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES BELOW	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PRAYER	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
FEDERAL CONSTITUTIONAL PROVISION INVOLVED	2
STATE CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. This Court should take steps to prevent the judicial sleight of hand whereby a plaintiff who prevails on a civil rights claim pursuant to equal protection guarantees is nevertheless deprived of an award of attorney's fees under § 1988	5
II. If attorney's fees are not available for vindication of civil rights under state constitutions whose protection are coextensive with the United States Constitution, plaintiffs will be forced to forgo state courts and bring all § 1983 cases in federal court. This result will flood the federal courts and defeat the congressional intent that states provide a forum for the bringing of civil rights suits based on the federal constitution	9
CONCLUSION	10

TABLE OF CONTENTS—Continued

Page

APPENDIX A (Opinion, New Mexico Supreme Court) 1a

APPENDIX B (*Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) 6a

APPENDIX C (Civil Rights Attorney's Fees Awards Act of 1976: 42 U.S.C. § 1988) 20a

APPENDIX D (Complaint, Count Six) 21a

TABLE OF AUTHORITIES

SUPREME COURT CASES	Page
Delaware v. Prouse, 440 U.S. 648 (1978)	7, 8
Martinez v. California, 444 U.S. 277 (1980)	5, 9
McLaughlin v. Florida, 379 U.S. 184 (1964)	6
Michigan v. Long, 463 U.S. 1032 (1983)	8
South Dakota v. Neville, 459 U.S. 553 (1983)	8
Spencer v. South Carolina, 53 U.S.L.W. 4431 (March 26, 1985)	9
OTHER JURISDICTIONS	
Anaconda Co. v. Property Tax Dept., 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979)	6
Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984)	4, 7
Espanola Housing Authority v. Atencia, 90 N.M. 787, 568 P.2d 1233 (1977)	6
Garcia v. Albuquerque Public Schools Board, 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980)	6
Gruschus v. Bureau of Revenue, 74 N.M. 775, 399 P.2d 105 (1965)	6
McGeehan v. Bunch, 88 N.M. 308, 540 P.2d 238 (1975)	6
People v. Brisendine, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975)	7
Sena School Bus Co. v. Board of Education, 101 N.M. 26, 677 P.2d 639 (Ct. App. 1984)	6
CONSTITUTIONS	
Amendment Fourteen, United States Constitution	2
Article 2, § 18, New Mexico Constitution	2
STATUTES	
Title 28, United States Code, § 1257	1
Title 42, United States Code, § 1983	2, 5, 9
Title 42, United States Code, § 1988	2, 4, 5, 9
MISCELLANEOUS	
1984 Annual Report of the Director of the Administrative Office of the United States Courts	10
122 Cong. Rec. 35128 (1976)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

JOHN J. CHAPMAN, *et al.*,
Petitioners,

v.

ROBERT E. LUNA, PH.D., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

PRAYER

The Petitioners, John J. Chapman, Troy H. Elliott, and N. Altom, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the New Mexico Supreme Court entered in this proceeding on June 11, 1985.

OPINION BELOW

The Opinion of the New Mexico Supreme Court, not yet reported, appears as Appendix A, attached.

JURISDICTION

The Opinion of the New Mexico Supreme Court was filed on June 11, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Civil Rights Act of 1871: 42 U.S.C. § 1983:

> Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Civil Rights Attorney's Fees Awards Act of 1976: 42 U.S.C. § 1988: Appendix C.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the United States Constitution, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE CONSTITUTIONAL PROVISION INVOLVED

New Mexico Constitution, Article 2, § 18:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.

STATEMENT OF THE CASE

In 1979, a motor vehicle emission inspection program (hereafter "Program") was created by joint ordinances of the City of Albuquerque and Bernalillo County. The final set of regulations was filed with the appropriate state agency on December 16, 1982, and the Program was scheduled to go into effect on January 3, 1983. The Petitioners filed an action in state court seeking to halt the operation and enforcement of the Program on the ground, *inter alia*, that the Program violated the Petitioners' right to equal protection under the law. Complaint, Count Six, Appendix D. The pleadings did not specify whether the deprivation was pleaded as a matter of state or federal law because the state and federal equal protection clauses had consistently been interpreted as substantively identical provisions by the state courts.

The district court ordered that the style of the action be recast, and the contractor responsible for implementation of the Program was allowed to intervene. Trial to the court was held on January 24 and 25, 1983.

Evidence was presented to the court on the issues of the Program's conflict with state statutes and its failure to afford equal protection to all similarly situated persons. Memoranda of law were subsequently submitted by the parties on all issues raised in the Complaint and during trial. Petitioners' memorandum argued, *inter alia*, that the City/County ordinances and regulations were not rationally related to the Program's goals; i.e., the effectuation of improved ambient air quality. Petitioners cited decisions of both the New Mexico Supreme Court and this Court in support for their claim of a deprivation of their right to equal protection.

The district court dismissed the Complaint and upheld the constitutionality and validity of the Program. On appeal, the New Mexico Supreme Court affirmed in part and

reversed in part. *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) (*Chapman v. Luna I*), attached as Appendix B. That court held that the Program's Inspection Fee was impermissible under state law and that the $75 repair provision, which established a maximum required low emission-related repair cost of $75, was not rationally related to any legitimate state end because it allowed the worst pollutors to continue to operate their vehicles. Finding that the provision did not have any reasonable basis since it exempted "certified" pollutors from a pollution control program, the court struck the repair maximum as violative of constitutional guarantees of equal protection. The court did not specify whether it was referring to the federal or state equal protection provisions, although the standard it applied was the federal "rational relation" test. The Opinion of the New Mexico Supreme Court was filed on March 13, 1984.

On April 4, 1984, Petitioners filed a Motion for Attorney's Fees based on 42 U.S.C. § 1988. The district court accepted briefs but did not hear oral argument or hold an evidentiary hearing. On July 2, 1984, the district court filed its Order denying the Motion for Attorney's Fees. On July 20, 1984, Petitioners appealed from this denial. The New Mexico Supreme Court filed its Opinion affirming the denial on June 11, 1985. *Chapman v. Luna II*. That court found that the equal protection issue had been decided as a matter of state law only, precluding application of § 1988.[1]

---

[1] Because the New Mexico Supreme Court ruled only on the threshold issue of whether Petitioners were deprived of a federal constitutional right, that court did not reach the additional federal questions raised in this case. On remand, the New Mexico court must determine whether Petitioners were prevailing parties for § 1988 purposes and whether it will exercise its discretion to award attorney's fees under that section.

REASONS FOR GRANTING THE WRIT

I. This Court should take steps to prevent the judicial sleight of hand whereby a plaintiff who prevails on a civil rights claim pursuant to equal protection guarantees is nevertheless deprived of an award of attorney's fees under § 1988.

An important consequence of the federalism principle which unites this country is that the federal courts are not the only repository of federal rights. This Court has specifically recognized that § 1983 claims are appropriately adjudicated in state court. *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980). It is essential to the policy of federalism that this Court has consistently expressed that state courts remain responsive to plaintiffs asserting federal rights. The New Mexico Supreme Court has found a novel method of circumventing the concurrent jurisdiction policy essential to the efficient operation of § 1983. To allow the New Mexico Supreme Court to subvert civil rights claims by denominating them as based only on state law would set a pattern that could be followed by every state which interprets its constitution as providing protection that is coextensive with the guarantees of the Fourteenth Amendment.

In the present case, the New Mexico Supreme Court was selective about its enforcement of federal rights. It refused to allow the Petitioners to be deprived of their civil rights through an ordinance that violated equal protection gauged according to the federal standard, but it then refused to accord Petitioners their Congressionally mandated rights under § 1988. The mechanism which the court employed to defeat the § 1988 claim was the subterfuge of labelling its decision as resting on state grounds only. That label is deceptive because the state equal protection clause provides the same protection as the federal equal protection clause.

For all substantive purposes, the New Mexico equal protection clause has always been interpreted as identical

to the federal equal protection clause. For example, in the face of a challenge based explicitly on both the state constitution and the Fourteenth Amendment, the New Mexico Supreme Court, in *Espanola Housing Authority v. Atencia*, 90 N.M. 787, 568 P.2d 1233 (1977), upheld a state statute as not violative of equal protection. The court applied the same analysis to both the state and the federal equal protection clauses. In *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975), the New Mexico Supreme Court applied the test annunciated by this Court in *McLaughlin v. Florida*, 379 U.S. 184 (1964), to invalidate the New Mexico guest statute as not reasonable in light of its purpose. In *Gruschus v. Bureau of Revenue*, 74 N.M. 775, 399 P.2d 105 (1965), the New Mexico Supreme Court upheld a taxing provision as violative of neither the state nor the federal equal protection clause where the tax was "equal and uniform on all subjects of a class and the classifications for taxation [were] reasonable." 74 N.M. at 777, 399 P.2d at 106.

In *Sena School Bus Co. v. Board of Education*, 101 N.M. 26, 677 P.2d 639 (Ct. App. 1984), the New Mexico Court of Appeals held that "[t]he tests to determine the validity of a statute challenged under the United States and New Mexico equal protection clauses *are the same.*" 101 N.M. at 29, 677 P.2d at 642 (emphasis added). In *Anaconda Co. v. Property Tax Dept.*, 94 N.M. 202, 608 P.2d 514 (Ct. App. 1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), the same court stated that "[t]he equal protection clauses of the United States and New Mexico Constitutions have been interpreted similarly," 94 N.M. at 210, 608 P.2d at 522, and cited federal as well as state cases in setting forth the basic construction principles. In *Garcia v. Albuquerque Public Schools Board*, 95 N.M. 391, 622 P.2d 699 (Ct. App. 1980), the court held that "*[t]he standards for violation of the equal protection clauses of the United States and New Mexico Constitutions are the same.*" 95 N.M. at 393, 622 P.2d at 701 (emphasis added). Therefore,

when the New Mexico Supreme Court found that the Program violated an equal protection standard in New Mexico, by definition it violated both the state *and* federal equal protection standard.

Only in *Chapman v. Luna II*, where attorney's fees are at issue, does it appear that a distinction can be made between state and federal equal protection. But even in *Chapman v. Luna II*, where the Court explicitly stated that the equal protection clauses of the United States Constitution and the New Mexico Constitution "constitute independent rights and protections," Op. at 2, the distinction relates only to the source of the rights and not to any substantive difference between the federal and state protections. Indeed, *Chapman v. Luna II* affirmed the decision in *Chapman v. Luna I*, which had applied the federal rational relation test to strike the ordinance on constitutional grounds.[2]

Whether there is an adequate and independent state ground is a federal question. *Delaware v. Prouse*, 440 U.S. 648 (1978). There, this Court held that its jurisdiction is properly invoked when a state court explicitly bases its decision on parallel state and federal constitutional provisions such that a violation of the federal constitution is necessarily a violation of the state constitution. Because the Delaware Supreme Court's interpretation of its own constitution concededly depended upon its interpretation of the Fourth and Fourteenth Amend-

---

[2] The issue presented in this Petition does not arise where a state court has interpreted its own constitution as providing greater protection than the federal constitution and therefore accords relief not available under the federal guarantees. For example, in *People v. Brisendine*, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975), the California Supreme Court held that the California Constitution provided greater protection against unreasonable searches and seizures than that required by the United States Constitution. The court therefore held invalid a search which met the minimum Fourth Amendment requirements as set forth by this Court. Petitioner does not challenge the nonreviewability of *Brisendine*.

ments, this Court granted certiorari and decided the case on the merits. *See also South Dakota v. Neville*, 459 U.S. 553 (1983) (state court decision did not rest on an independent state ground where state court "simply assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege." 459 U.S. at 556-57, n.5).

In *Prouse* and *Neville*, the state courts reasoned that because there was a violation of the federal constitution, there was also an automatic violation of the state constitution. This Court held that under these circumstances, the state ground was not independent of the federal ground. In the present case, however, the state court found a violation of the state constitution and professed not to address the federal constitutional question, even though it had previously construed the federal and state provisions as substantively identical. Under these circumstances, this Court should also find that the state ground is not independent of the federal constitution.

This case presents the issue left undecided by this Court's recent opinion in *Michigan v. Long*, 463 U.S. 1032 (1983). There, the Court held that in the absence of a plain statement from a state court asserting the independence of the state law ground, the Court would assume that the state law ground is not independent of federal law.

Long, however, did not decide whether the plain statement test is satisfied merely by a state court's conclusory assertion of independence of the state law ground. This Court has never determined when a state ground is independent in the context of a civil rights action. This issue is especially important in civil rights cases because the "adequate and independent state law" rule means that a plaintiff who prevails on state grounds only will not be eligible to receive the award of attorney's fees that would be proper if a violation of the federal constitution were found.

Section 1988 was enacted to assure that potential plaintiffs would not "be deterred from bringing deserving cases to remedy violations of the Constitution," 122 Cong. Rec. 35128 (1976). It is therefore important that this Court instruct those states whose courts have interpreted their constitutions as providing guarantees equivalent to the federal equal protection and due process guarantees that reliance on state grounds which previously have been held to be the substantive equivalent of federal grounds does not constitute an independent state basis and therefore does not preclude an award of attorney's fees under § 1988.[3] To allow the New Mexico Supreme Court decision to stand would be to encourage a pernicious erosion of the rights secured by the Civil Rights Act.

II. If attorney's fees are not available for vindication of civil rights under state constitutions whose protection are coextensive with the United States Constitution, plaintiffs will be forced to forgo state courts and bring all § 1983 cases in federal court. This result will flood the federal courts and defeat the congressional intent that states provide a forum for the bringing of civil rights suits based on the federal constitution.

If a parallel violation of state and federal constitutions does not allow attorney's fees to be awarded to the prevailing plaintiffs, attorneys will file civil rights actions only in federal courts for fear of penurious state courts. This flooding of the federal courts would defeat the congressional intent to allow concurrent jurisdiction and would create an intolerable burden on the federal judicial system.

---

[3] A finding that the State ground is independent would raise the issue of whether the State court must reach the § 1983 claim. That issue was not addressed in *Martinez v. California, supra.* Although raised just last term, the issue was not decided because the judgment below was affirmed by an equally divided Court. *Spencer v. South Carolina,* 53 U.S.L.W. 4431 (March 26, 1985).

In recent years, the number of civil rights cases brought in federal courts has increased dramatically. In 1984 alone, 21,219 civil rights cases were filed in United States district courts, an increase of 7.5 percent over the 19,735 cases filed in 1983. Moreover, as of June 30, 1984, there were 1,137 civil rights cases pending for three or more years in the federal district courts. 1984 Annual Report of the Director of the Administrative Office of the United States Courts, 145, 158. Precluding state courts from employing the "independent state grounds" subterfuge as a means of refusing attorney's fees would encourage the use of state courts for the bringing of civil rights actions and would alleviate the burden on the federal system.

CONCLUSION

For the reasons given above, Petitioners respectfully pray that this Honorable Court grant this Application for Writ of Certiorari and that they be given the opportunity to further brief and argue the issues related herein.

Respectfully submitted,

BRUCE E. PASTERNACK
BRUCE E. PASTERNACK, P.C.
Two Woodward Center
700 Lomas, N.E., Suite 100
Albuquerque, New Mexico 87102
(505) 842-1800
Attorney for Petitioners

APPENDICES

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 15,553

JOHN J. CHAPMAN, *et al.*,
Plaintiffs-Appellants,
and Cross-Appellees,

vs.

ROBERT E. LUNA, PH.D., *et al.*,
Defendants-Appellees,
and Cross-Appellants,

and

HAMILTON TEST SYSTEMS, INC.,
Intervenor-Appellee.

[Filed June 11, 1985]

Appeal from the District Court of Bernalillo County
Philip R. Ashby, District Judge

Bruce E. Pasternack
Albuquerque, NM — For Appellants

Gary O'Dowd
Albuquerque, NM — For Appellee City of Albuquerque

Hunter Geer
Joe Diaz
Albuquerque, NM — For Appellee County of Bernalillo

Sutin, Thayer & Browne
Charles Brideau
Philip Higdon
Santa Fe, NM — For Hamilton Test Systems

OPINION

FEDERICI, Chief Justice.

Plaintiffs-Appellants (plaintiffs) filed suit in the Bernalillo County District Court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque/Bernalillo County Motor Vehicle Emission Inspection Program (Program) was unlawful. The district court dismissed the complaint and upheld the Program. Plaintiffs appealed the dismissal to this Court which, in *Chapman v. Luna*, 101 N.M. 59, 678 P.2d 687 (1984) (*Chapman v. Luna I*), affirmed in part and reversed in part. The mandate issued on March 28, 1984, remanding the cause to the district court. On April 4, 1984, plaintiffs filed in the district court a motion for attorney fees, pursuant to 42 U.S.C. Sections 1983 and 1988 (1982). Plaintiffs now appeal from the district court's denial of the motion. We affirm the district court.

In *Chapman v. Luna I*, plaintiffs were successful in having two aspects of the Program invalidated by this Court. The inspection fee was invalidated on state statutory grounds and the $75.00 repair provision was held to violate "equal protection standards." Plaintiffs now argue that the equal protection allegation was a 42 U.S.C. Section 1983 cause of action and that because they prevailed on this issue, they are entitled to Section 1988 attorney fees. Count six of plaintiffs' complaint contained the equal protection claim. It did not specifically refer to the New Mexico Constitution, the United States Constitution, Section 1983, or Section 1988.

Section 1988 provides in part: "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Plaintiffs' entitlement to Section 1988 attor-

ney fees depends upon whether their original suit was an action under Section 1983.

The statutory prerequisites for a Section 1983 cause of action are "that the defendants must have acted under color of law, regulation, custom or usage of the State of New Mexico, and that the plaintiff must have been deprived of federal constitutional rights, privileges and immunities." *Gomez v. Board of Education*, 85 N.M. 708, 711, 516 P.2d 679, 682 (1973); *Stringer v. Dilger*, 313 F.2d 536 (10th Cir.1963). Plaintiffs' contention that their original lawsuit was a Section 1983 cause of action fails due to their inability to show that deprivation of a federal constitutional right was raised and decided in their favor in *Chapman v. Luna I*.

In *Chapman v. Luna I*, this Court did not specifically refer to either the New Mexico Constitution or the United States Constitution in holding that the $75.00 repair provision violated "equal protection standards." We referred solely to New Mexico case law. Although the equal protection clauses of the United States Constitution and the New Mexico Constitution have been interpreted similarly, *Anaconda Co. v. Property Tax Department*, 94 N.M. 202, 608 P.2d 514 (Ct.App.1979), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980), they nevertheless constitute independent rights and protections.

In an analogous case, the California Supreme Court invalidated a state statute as violating "the basic constitutional guaranty of equal protection of the law. . . ." *Department of Mental Hygiene v. Kirchner*, 60 Cal.2d 716, 717, 36 Cal.Rptr. 488, 388 P.2d 720 (1964). The United States Supreme Court granted certiorari, but then vacated and remanded the case to the California Supreme Court to clarify "whether that court relied on the State Constitution alone, the Federal Constitution alone, or both." *Department of Mental Hygiene v.*

Kirchner, 380 U.S. 194, 198 (1965). On remand the California Supreme Court held that the statute had been invalidated on state constitutional grounds and not by compulsion of the Federal Constitution. *Department of Mental Hygiene v. Kirchner*, 62 Cal.2d 586, 43 Cal.Rptr. 329, 400 P.2d 321 (1965). The Supreme Court of California determined that the state and federal equal protection clauses "provide generally equivalent but independent protections in their respective jurisdictions." 62 Cal.2d at 588, 43 Cal.Rptr. at 330, 400 P.2d at 322.

Similarly, we determine that the $75.00 repair provision was invalidated in *Chapman v. Luna I* solely on New Mexico constitutional grounds. Appellants did not specifically plead a federal equal protection claim or a claim under 42 U.S.C. Section 1983, and this Court did not decide that issue under compulsion of the Federal Constitution.

Chapman v. Luna I, therefore, did not present or decide a federal question. Appellants did not prevail in proving a deprivation of a federal constitutional right, privilege, or immunity. Their cause of action was not a Section 1983 action. The case was brought under the New Mexico Declaratory Judgment Act, NMSA 1978, Sections 44-6-1 to -15, and was decided solely on state statutory and state constitutional grounds. Having failed to prevail in an action to enforce Section 1983, plaintiffs are not entitled to any attorney fees under Section 1988.

On cross-appeal, defendants contend that the district court erred in awarding plaintiffs their appellate costs. We find this question to be moot. The contested costs were paid by Hamilton Test Systems, Inc., who is not a party to this appeal. Furthermore, plaintiffs assert no claim against the City and County for the costs.

The judgment of the district court is affirmed. The cause is remanded for entry of judgment on mandate in conformity with this opinion.

IT IS SO ORDERED.

/s/ William R. Federici
WILLIAM R. FEDERICI
Chief Justice

WE CONCUR:

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Senior Justice

/s/ Harry E. Stowers, Jr.
HARRY E. STOWERS, JR.
Justice

APPENDIX B

SUPREME COURT OF NEW MEXICO

No. 14867

JOHN J. CHAPMAN, TROY H. ELLIOTT and N. ALTOM,
Petitioners-Appellants,

v.

ROBERT E. LUNA, Ph.D., ANN HYDE, ERIKA JONES, JONATHAN SAMET, Ph.D., GARY LEWIS, JAMES MONTOYA and MIKE CREUSERE, as members of the ALB/BERN COUNTY AIR QUALITY CONTROL BOARD, CITY OF ALBUQUERQUE and the BOARD OF COUNTY COMMISSIONERS OF BERNALILLO,
Respondents-Appellees.

March 13, 1984

Bruce E. Pasternack, Michael J. Condon, Albuquerque, for petitioners-appellants.

Gary O'Dowd, City Atty., Barbara W. Stephenson, Asst. City Atty., Albuquerque, Brown, Bain & Bingaman, Philip R. Higdon, Santa Fe, Hunter L. Geer, Joe Diaz, Albuquerque, for respondents-appellees.

OPINION

RIORDAN, Justice.

John J. Chapman, Troy H. Elliott, and N. Altom (Petitioners) filed suit in district court seeking a declaratory judgment that the operation and enforcement of the joint Albuquerque-Bernalillo County Motor Vehicle Emis-

sions Inspection Program (Program) is unlawful. After a non-jury trial, the district court dismissed Petitioners' complaint and entered an order upholding the Program. Petitioners appeal. We affirm in part and reverse in part.

The issues we address [1] are:

I. Whether state law prohibits the City from imposing an inspection fee for the Program.

II. Whether the Program violates equal protection standards by allowing exemptions not based on reasonable distinctions.

III. Whether the Program's criminal penalty provisions are invalid.

IV. Whether the ordinances' severability clauses should be given effect.

In 1979, the Albuquerque City Council (Council) and the Bernalillo County Commission (Commission) enacted ordinances which established prohibitions against excessive air pollutant emissions from motor vehicles in the city of Albuquerque and in Bernalillo County. The ordinances delegated the power to regulate the operation of a vehicle emissions inspection and maintenance program to the Albuquerque-Bernalillo County Air Quality Control Board (Board).

The Board, pursuant to its authority, adopted regulations for the establishment and operation of the Program. The Program requires that all private motor vehicles manufactured in 1968 and thereafter undergo an emissions inspection. Any vehicle failing the initial inspection may obtain a waiver from compliance with Board emission standards if the vehicle receives a prescribed

---

[1] The issues we address on appeal are limited and specific. A number of other issues discussed at oral argument, but not raised in the briefs, might effect the validity of the Program. Therefore, this opinion is not to be construed as an approval of the Program.

low-emissions tune-up, or up to $75.00 worth of repairs in attempting to bring the vehicle into compliance ($75.00 Repair Provision). Upon payment of an inspection fee (Inspection Fee), the vehicle owner is given an inspection certificate (Certificate) to be displayed on the vehicle. Violation of any provision of the Program is a misdemeanor punishable by a fine of not more than $300.00 and/or not more than 90 days imprisonment for operating a registered vehicle without a Certificate.

The Program was to go into effect on December 31, 1982. Petitioners filed a petition for writ of mandamus seeking to halt operation and enforcement of the Program on statutory and constitutional grounds. The district court granted a motion for leave to intervene by Hamilton Test Systems, Inc. (Hamilton) on the basis of Hamilton's status as a party to the contract with the City of Albuquerque (City) for design and operation of the Program's test stations. On January 7, 1983, the district court ordered operation and enforcement of the Program ceased until January 17, 1983. The district court subsequently designated the action as a suit for declaratory judgment.

I. Inspection Fee.

Petitioners argue that the imposition of the Inspection Fee constitutes the charging of fees for vehicles subject to registration under the Motor Vehicle Code, NMSA 1978, Sections 66-1-1 to 8-140 (Orig.Pamp. and Cum. Supp.1983), and that Section 66-6-25 prohibits imposition of the Inspection Fee. Section 66-6-25 provides:

> No county or municipality shall require registration or charge *fees* for any vehicle subject to registration under the Motor Vehicle Code * * *. (emphasis added).

The Council, Commission, and Hamilton argue that the Inspection Fee is not a "fee" within the meaning of

Section 66-6-25. They claim that the purpose of Section 66-6-25 is to prohibit cities and counties from using vehicles as a means of raising general revenues and that the Inspection Fee is only for defraying the administrative costs of an environmental program that was specifically delegated to local authorities by the State. They also argue that the Inspection Fee is a valid exercise of local authorities' home rule power. We disagree.

This Court has the duty of construing statutes, if possible, to resolve any apparent conflict. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P.2d 478 (1977). However, where a statute makes sense as written, we will not read language into it which is not there. *Burroughs v. Board of County Commissioners*, 88 N.M. 303, 540 P.2d 233 (1975). Section 66-6-25 states that no city or county shall charge *fees* for motor vehicles. It does not limit cities and counties to the imposition of only certain fees as the Council, Commission and Hamilton argue. Instead, Section 66-6-25 makes clear the legislative intent that cities and counties are prohibited from charging *any* fees for motor vehicles, regardless of the purpose of the fees.

We therefore determine that the imposition of the Inspection Fee is prohibited under Section 66-6-25.

N.M. Const. Art. X, Section 6, the municipal home rule amendment, provides in pertinent part:

> D. A municipality which adopts a charter may exercise all legislative powers and perform all functions *not expressly denied by general law* or charter. (emphasis added).

The major case discussing "municipal home rule" in New Mexico is *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974). The issue in *Apodaca* was whether the City of Albuquerque could increase water and sewer rates and apply the increased revenue to municipal functions other than those set out by statute. The statutes at that time

specifically allowed the City to use water and sewer revenues for "maintaining, enlarging, extending, constructing and repairing' " water and sewer systems. *Id.* at 519, 525 P.2d at 880 (quoting NMSA 1953, Repl.Vol. 3, (1968)), § 14-26-4 and § 14-25-2(A). The statutes did not authorize the revenue to be used for any other purpose nor did it forbid its use for other municipal functions. In ruling in favor of the City, this Court stated:

> The [Municipal Home Rule Amendment] and art. I of the City Charter enable the City, as a municipal corporation, to exercise all legislative powers and to perform all functions *not expressly denied by* the City Charter or *general state law.*

Apodaca, 86 N.M. at 520, 525 P.2d at 880 (emphasis added). This Court defined "general law" as "a law that applies generally throughout the state, or is of statewide concern * * *." *Apodaca*, 86 N.M. at 521, 525 P.2d at 881. This Court also determined that "not expressly denied" means that "some express statement of the authority or power denied must be contained in such general law in order to be applicable * * * or otherwise no limitation exists." *Apodaca*, 86 N.M. at 521-522, 525 P.2d at 881-882.

The law at issue here, Section 66-6-25, applies generally throughout the state and is of statewide concern because the people of the state have an interest in maintaining a uniform system of conditions and charges for operating motor vehicles in the state. Section 66-6-25 is therefore a "general law", and it clearly and expressly states that cities and municipalities are prohibited from charging fees for motor vehicles subject to registration.

Therefore, we also determine that the imposition of the Inspection Fee is not a valid exercise of local authorities' home rule power.

II. Equal Protection.

Petitioners argue that the Program violates equal protection standards because: (1) it exempts from coverage vehicles manufactured before 1968 and all vehicles less than one year old; and (2) the $75.00 Repair Provision is discriminatory in its application.

We have previously determined that:

> Equal protection does not prohibit classification for legislative purposes, provided that there is a rational and natural basis therefor, that it is based on a substantial difference between those to whom it does and those to whom it does not apply, and that it is so framed as to embrace equally all who may be in like circumstances and situations.

Gruschus v. Bureau of Revenue, 74 N.M. 775, 778, 399 P.2d 105, 107 (1965) (citations omitted). Furthermore, a presumption exists that legislative acts of a municipality are legal and valid, and their provisions are presumed constitutional. *City of Albuquerque v. Jones*, 87 N.M. 486, 535 P.2d 1337 (1975). Since the Program is "legislative in nature", the presumption extends to it. *Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd.*, 80 N.M. 633, 637-638, 459 P.2d 159, 163-164 (Ct.App.1969).

Petitioners first argue that there is no significant difference between 1967 model vehicles and 1968 model vehicles which justifies exempting 1967 model vehicles from the Program. They claim that the fact that pre-1968 motor vehicles were not required by the EPA to have anti-pollution devices installed does not provide a rational basis for the exemption. We disagree.

The record indicates that the pre-1968 model vehicle exemption was decided upon for several reasons. First, the Environmental Protection Agency (EPA) did not require pre-1968 model vehicles to have pollution control devices. Second, EPA recommends that pre-1968 model

vehicles and vehicles more than 15 years old be exempted from emissions inspection maintenance programs that grant age exemptions. The record indicates that such exemptions are granted in Connecticut, Missouri, and Colorado, while other programs exempt an even larger group of vehicles. Third, mechanical differences render pre-1968 vehicles more difficult to test for emission levels than vehicles manufactured in 1968 and thereafter. In addition, the State of New Mexico, pursuant to Section 66-3-844(C), requires that all vehicles manufactured in 1968 and thereafter be "maintained in good working order with the factory-installed devices and equipment * * * designed to prevent, reduce or control exhaust emissions or air pollution." Testimony at trial indicated that pre-1968 model vehicles cannot be measured by state-of-the-art testing equipment and that it is difficult to obtain parts in repairing and tuning-up pre-1968 model vehicles. Testimony at trial also indicated that it would be impossible to bring pre-1968 model vehicles within applicable emission standards without unfairly applying these standards.

After reviewing the record, we determine that the pre-1968 model vehicle exemption does not violate equal protection standards because there are significant differences between 1967 and 1968 model vehicles which provide a rational basis for exempting pre-1968 model vehicles.

Petitioners also argue that the $75.00 Repair Provision is discriminatory in its application. The Program establishes a maximum required low emission-related repair cost of $75.00 for vehicles to qualify for a certificate of waiver. However, the $75.00 Repair Provision does not apply to the cost of replacing or repairing anti-pollution equipment that has been removed or rendered inoperable by any person. Petitioners claim that by requiring the latter group of vehicles to come into compliance, regardless of cost, this exemption denies equal protection to those persons whose anti-pollution devices have

been removed or rendered inoperable through no fault of their own.

It is rational and proper to single out persons who have intentionally removed or rendered inoperable anti-pollution devices. However, the Program allows vehicles whose anti-pollution devices that do not function properly or have been rendered inoperable or removed by another means to undergo no more than $75.00 worth of repairs even if those repairs do not bring the vehicle into compliance. The Federal Government has required all vehicles manufactured in a current year to meet certain emission standards. 42 U.S.C. § 7521(a) (Supp.V.1981). It is a violation of Federal law to remove or render inoperable the manufacturer's anti-pollution devices. 42 U.S.C. § 7522(a)(3)(A) (Supp.V.1981). In our opinion, it is not unfair or unreasonable to single out this group of violators and require them to spend whatever it takes to bring their vehicles into compliance. Nor is it unreasonable to exempt new cars from testing since Federal law requires that they meet the federal standards when manufactured. 42 U.S.C. § 7521(a) (Supp.V.1981).

This does not, however, address the real issue involving the $75.00 exemption. The Program, through testing, identifies vehicles that pollute. However, by paying up to $75.00 to a private individual, a mechanic, it allows the violators who are in effect "certified" as the worst pollutors to continue to operate their vehicles. This is not rational. It does not have any reasonable basis, nor is it designed to further the objectives of cleaning up the air. Allowing cars that fail the test to undergo no more than $75.00 worth of repairs, violates the Program's stated purpose which is to protect the health and welfare of the citizenry by reducing pollutant levels. If the Program is to operate fairly and pursue its stated purpose, then it is essential that all vehicles tested and proved to be operating below the Program's emission standards be required to undergo sufficient repairs to bring them into compliance regardless of the expense involved.

We therefore determine that the $75.00 Repair Provision is invalid.

III. *Criminal Penalties.*

Petitioners also argue that the Program is invalid because it imposes a criminal penalty in violation of state law. Article X, Section 6 provides in pertinent part:

> E. The purpose of this section is to provide for maximum local self-government. *A liberal construction shall be given* to the powers of municipalities. (emphasis added).

In reviewing city legislation, we consider that:

> [A] home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act. *To adopt any other interpretation in New Mexico would make the home rule amendment meaningless.*

Apodaca, 86 N.M. at 521, 525 P.2d at 881 (emphasis added).

In determining the authority of the Council to enact its ordinance, including its penalties, we must look at the applicable legislative enactment, the state Air Quality Control Act, NMSA 1978, Section 74-2-1 to Section 74-2-17 (Repl.Pamp.1983). Section 74-2-3(A) grants the Environmental Improvement board enforcement authority except in "municipalities within A class counties or A class counties which have elected, by adopting the appropriate ordinance, to assume jurisdiction for the administration and enforcement of the Air Quality Control Act." [2]

The Act specifically provides in Section 74-2-4(A) that:

---

[2] An "A class county" is defined by NMSA 1978, Section 4-44-1 (Repl.Pamp. 1980) as counties "having a final, full assessed valuation of over seventy-five million dollars ($75,000,000) and having a population of one hundred thousand persons or more as determined by the last official United States census[.]"

> A class counties and any municipality wthin an A class county which provides for air quality control *shall*, by ordinance, provide for the local administration and enforcement of the Air Quality Control Act * * *. The provision of any such ordinance *shall be consistent* with the *substantive provisions* of the Air Quality Control Act * * *. (emphasis added).

The enforcement under the Act is civil in nature with two exceptions which are contained in Section 74-2-14. Section 74-2-14 provides in pertinent part:

> A. [A]ny A class county or municipality within an A class county *may* prescribe penalties for violations of an ordinance:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law and *requiring the maintenance of* [*motor vehicle emission control*] *devices in operating condition.*
>
> B. [I]t *shall* be a petty misdemeanor to violate any regulation of the environmental improvement board:
>
> * * * *
>
> (2) prohibiting the removal of motor vehicle emission control devices installed as required by law or *requiring the maintenance of* [*motor vehicle emission control*] *devices in operating condition.* (emphasis added).

The question becomes whether the Act, which under *Apodaca* is a "general state law", in any way "expressly denies" the City the authority to provide for criminal sanctions.

Our reading of *Apodaca* leads to the inescapable conclusion that not only is there no express denial of that authority, but the Legislature specifically authorized it in Section 74-2-14. The fact that the Legislature provided

additional civil penalties and prescribed the penalty for violation of board *regulations* does not eliminate that authority.

We therefore determine that the criminal penalty provisions of the Program are not invalid.

IV. *Severability Clause.*

Having determined that at least two provisions of the ordinances are invalid, we address the effect of our decision. The ordinances have the following severability clause:

> If any section, subsection, sentence, clause, word or phrase of this ordinance is for any reason held to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

We have previously addressed the effect of the inclusion of a severability clause in an ordinance. In *Schwartz v. Town of Gallup*, 22 N.M. 521, 529, 165 P. 345, 348 (1917) we stated:

> A part of the law may be unconstitutional and the remainder of it valid, where the objectionable part may be properly separated from the other without impairing the force and effect of the portion which remains, and where the legislative purpose as expressed in such valid portion can be accomplished and given effect, independently of the void provisions, and where if the entire act is taken into consideration it cannot be said that the enacting power would not have passed the portion retained had it known that the void provisions must fall. (citation omitted).

We have determined that a severability clause raises a presumption that the legislating body would have enacted the rest of the ordinance without the void section. *Barber's Super Markets v. City of Grants*, 80 N.M. 533, 458

P.2d 785 (1969). The severability clause in this case is emphatic in its statement that the ordinances would have been enacted even if the invalid provisions were not included.

We therefore determine that the invalid provisions do not invalidate the ordinances.

V. *Conclusion.*

We are aware of the tremendous problem the government faces in trying to alleviate air pollution, some of which can be attributed to motor vehicle emissions. We are also aware of the difficulty involved in developing a program that meets the objective of clean air while complying with statutory and constitutional limitations. However, it is not for the courts to develop such a program, but rather it is the responsibility of the Legislature, the City, and the County to do so.

We conclude that the Program may be continued without imposition of a fee and without a repair cap for vehicles that do not come into compliance; otherwise, the Council and Commission will have to discontinue the Program.

IT IS SO ORDERED.

SOSA, Senior Justice, specially concurring.

FEDERICI, C.J., and STOWERS and WALTERS, JJ., concurring in part and dissenting in part.

SOSA, Senior Justice, specially concurring.

I concur with the four points in this opinion. However, under Point II, I would address the equal protection issue that was raised in oral argument, but not presented in the briefs. Specifically, the question of whether the program should be applied to all state residents or merely to residents of Bernalillo County is one that I believe merits attention. In *Wylie Brothers Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Board*, 80 N.M. 633, 459 P.2d 159 (Ct.App.1969), an opinion dealing with air pollution regulations, Justice Oman anticipated the problems we would encounter if regulations and controls were only local and not statewide. There he prophetically stated:

> To draft, and particularly to enforce, regulations for the control of emissions from these highly mobile vehicles on a single county-wide basis, would be extremely difficult. *The making of regulations relative to the control of emissions from these vehicles belongs to an agency with far greater geographic jurisdiction than that of a single county.* The control thereof should be left very largely, if not entirely, to the state and federal governments. (emphasis added).

Id. at 644, 459 P.2d at 170.

This is an issue of significant importance and general public nature affecting the interest of the state at large and, as such, this Court may consider it. *DesGeorges v. Grainger*, 76 N.M. 52, 412 P.2d (1966). All citizens, not only those in Bernalillo County, should be afforded protection against air pollutants. A statewide program against vehicular pollution would equally regulate all vehicles in the state and remove the inequities in the program. As presently enforced, the pollution control pro-

gram subjects only residents of Bernalillo County to the Inspection Program. The greater Albuquerque metropolitan area covers other counties. Citizens of these outside counties use Bernalillo County roads daily yet are not subject to the Inspection Program. This appears to me to be an arbitrary, unfair and selective imposition of a regulation on Bernalillo County residents.

It is my reading of Section 66-6-25, NMSA 1978, of the Motor Vehicle Code, that the statute directly prohibits the charging of any fees in connection with the operation of motor vehicles, no matter how noble the purpose. As a matter of public policy and with deep concern for the health and welfare of New Mexico citizens, I agree with the need for an effective program to prevent increased air pollution. However, it is not within the province of the judiciary to change Section 66-6-25. The legislature must remedy this defect.

FEDERICI, Chief Justice and WALTERS, Justice (concurring in part, dissenting in part).

We concur in Justice Riordan's disposition of Points II, III, and IV. We disagree with the decision regarding Point I since Section 66-6-25, NMSA 1978, refers to proscription of fees for "registration" of vehicles by a county or municipality, and not to fees for other purposes. We therefore respectfully dissent on that issue.

STOWERS, Justice (concurring in part, dissenting in part).

I concur in the disposition of points I, II, and IV of the opinion. I dissent as to point III, in that the imposition of criminal penalties exceeds the legislative authority which is limited to civil sanctions and fines.

APPENDIX C

42 U.S.C.

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

APPENDIX D

COMPLAINT

* * * *

COUNT SIX

(Equal Protection)

31. Petitioners re-allege paragraphs 1 through 30 in full.

32. The City Ordinance, County Ordinance and Regulations deprive Petitioners of equal protection under the law in that:

A. Motor vehicles manufactured before the 1967 model year are unreasonably exempted notwithstanding the fact that such vehicles contribute to hydrocarbon and carbon monoxide air pollution in the City and County;

B. Motor vehicles which are tested and fail are unreasonably exempted if they can be shown to pollute the air so badly that it would cost more than $75.00 to fix them; and,

C. Motor vehicles manufactured from the 1967 model year through the 1982 model year unreasonably, artificially and arbitrarily, and without natural basis, are not exempted and must comply as a result of which owners of such motor vehicles would bear the entire burden of paying for and complying with the City Ordinance, County Ordinance and Regulations notwithstanding the fact that such persons are not fully responsible for hydrocarbon and carbon monoxide air pollution from motor vehicle emissions.

33. To the extent the City Ordinance, County Ordinance and Regulations impose and create a denial of equal protection under the law to citizens of the City and County, they are unlawful and should not be enforced.